Metacorp Development v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R2–25–389 OF 2009
ROHANA YUSUF J
15 MARCH 2011

Administrative Law — Judicial review — Director General of Income Tax ('respondent') to raise notices of additional assessment — Whether judicial review available to applicant when alternative internal remedy of appeal available to applicant — Whether respondent acted in excess of authority

Civil Procedure — Jurisdiction — High Court — Doctrine of stare decisis — Whether court bound by decisions of superior courts

Revenue Law — Income tax — Assessment — Applicant applied for judicial review of respondent's decision to raise additional assessment — Whether judicial review available to applicant — Whether applicant should have appealed to Special Commissioners of Income Tax against assessment — Whether compensation from compulsory acquisition liable to tax — Whether respondent acted in excess of authority — Income Tax Act 1967 ss 91 & 99

Metacorp Development ('the applicant'), a property development company, purchased two parcels of land in Malacca ('the lands'). The lands were compulsorily acquired by the State Government of Malacca and the applicant was paid a compensation. The applicant did not subject the compensation it had received to income tax. The Director General of Income Tax ('the respondent') raised notices of additional assessment dated 9 December 2009 for the years of assessment 2004 and 2005 with penalty against the appellant. The applicant appealed against the assessment. However, instead of appealing to the Special Commissioners of Income Tax in accordance with s 99 of the Income Tax Act 1967 ('the Act'), the applicant obtained the leave of the High Court to file the present application for a judicial review of the respondent's decision to raise an additional assessment against it. It was the applicant's case that the compensation it had received for compulsory acquisition was not subject to income tax under the law and that the respondent had acted ultra vires and without any factual or legal basis in raising the said notices. The applicant further submitted that the decision impact statement ('DIS') issued by the respondent, upon which the respondent's decision to raise the additional assessment was based, was ultra vires and had no legal effect because it sought to override the decisions of the superior courts, namely the decision of the

Supreme Court in*Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713 ('the *Lower Perak* case') and the decision of the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd and another case* [2006] 3 MLJ 597 ('the *Penang Realty* case'). By way of this application the applicant sought, inter alia, declaratory orders that the DIS had no legal effect and could not override the courts' decisions in *the Lower Perak* case and *the Penang Realty* case, and an order of certiorari to quash the decision of the respondent to raise the notices of additional assessment. The respondent submitted that the present application for judicial review should not be entertained by this court because there was an alternative remedy in the form of an appeal procedure under the Act. The respondent further submitted that the decision made by the respondent to raise additional assessment was within its jurisdiction, as it was empowered under s 91 of the Act, and there was neither a failure on the part of the respondent to perform a statutory duty nor any breach of natural justice.

Held, allowing the application with costs:

(1) It is settled law that the availability of an alternative internal remedy in the form of an appeal process would not bar an application for judicial review. This is especially so where the complaint made to the court is one on error of law or abuse of power that goes to the legality of the conduct of the decision-making authority as in the present case. The applicant in the present case had demonstrated illegality and unlawful treatment and it would be wrong to insist that it exhaust its statutory right of appeal, even if it was available. In fact, the present case should preferably be referred to the court as it raised a question of law (see paras 7–10).

(2) In *the Penang Realty* case it was the decision of the Court of Appeal that compensation from compulsory acquisition was not liable to tax. The case applied the principle, which was enunciated in the *Lower Perak* case, that compulsory acquisition could not constitute sale because of the element of compulsion that vitiated the intention of trade. In the present case, the lands were stock-in-trade and were compulsorily acquired. In order to constitute gross income a third element was required, namely that the compulsory acquisition was in the course of carrying on a business. However, in the present case the compulsory acquisition was not in the course of carrying on business. Therefore, there would be an element of compulsion, which vitiated the intention to trade (see paras 17–20, 22–23).

(3) *The Penang Realty* case and *the Lower Perak* case were binding authorities on the respondent, being an arm of the executive. Thus the respondent's decision, which was not based on the legal authorities of the superior

courts, was in excess of its authority. Based on the doctrine of stare decisis, this court was also bound by the decisions of the superior courts (see para 24).

[Bahasa Malaysia summary

Metacorp Development ('pemohon'), syarikat pemaju perumahan, membeli dua bidang tanah di Melaka ('tanah tersebut'). Tanah tersebut diambil alih secara wajib oleh Kerajaan Negeri Melaka dan pemohon dibayar pampasan. Pemohon tidak membayar cukai pendapatan bagi pampasan yang diterimanya. Ketua Pengarah Cukai Pendapatan ('responden') telah mengeluarkan notis-notis taksiran tambahan bertarikh 9 Disember 2009 untuk tahun-tahun taksiran 2004 dan 2005 dengan penalti terhadap pemohon. Pemohon merayu terhadap taksiran tersebut. Walau bagaimanapun, pemohon sepatutnya merayu kepada Pesuruhjaya Khas Cukai Pendapatan mengikut s 99 Akta Cukai Pendapatan 1967 ('Akta'), sebaliknya memperolehi kebenaran daripada Mahkamah Tinggi untuk memfailkan permohonan ini untuk semakan kehakiman terhadap keputusan responden untuk membangkitkan taksiran tambahan terhadapnya. Ia adalah kes pemohon bahawa pampasan yang diterimanya untuk pengambilan alih wajib tidak tertakluk kepada cukai pendapatan di bawah undang-undang dan bahawa responden telah bertindak ultra vires dan tanpa apa-apa fakta atau asas undang-undang dalam mengeluarkan notis-notis tersebut. Pemohon selanjutnya berhujah bahawa penyata kesan keputusan ('PKK') yang dikeluarkan oleh responden, di mana keputusan responden untuk membangkitkan taksiran tambahan didasarkan, adalah ultra vires dan tidak mempunyai kesan undang-undang kerana ia memohon untuk menolak keputusan-keputusan mahkamah tinggi, terutamanya keputusan Mahkamah Agung dalam kes *Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713 ('kes *Lower Perak*') dan keputusan Mahkamah Rayuan dalam kes *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd and another case* [2006] 3 MLJ 597 ('kes Penang Realty'). Melalui permohonan ini pemohon memohon, antara lain, perintah-perintah perisytiharan bahawa PKK tidak mempunyai kesan undang-undang dan tidak boleh menolak keputusan-keputusan mahkamah dalam kes *Lower Perak* dan kes *Penang Realty*, dan perintah certiorari untuk membatalkan keputusan responden untuk mengeluarkan notis-notis taksiran tambahan. Responden berhujah bahawa permohonan ini untuk semakan kehakiman tidak patut didengar oleh mahkamah ini kerana terdapat remedi alternatif dalam bentuk prosedur rayuan di bawah Akta. Responden selanjutnya berhujah bahawa keputusan yang dibuat oleh responden untuk mengeluarkan taksiran tambahan adalah dalam bidang kuasanya, memandangkan ia diberi kuasa di bawah s 91 Akta, dan tidak terdapat kegagalan bagi pihak responden untuk melakukan tugas statutori ataupun apa-apa kemungkiran keadilan asasi.

Diputuskan, membenarkan permohonan dengan kos:

(1) Ia adalah undang-undang yang ditetapkan bahawa dengan terdapatnya

remedi dalaman alternatif dalam bentuk proses rayuan tidak akan menghalang permohonan untuk semakan kehakiman. Ini adalah khusus di mana aduan yang dibuat di mahkamah adalah salah satu kesilapan undang-undang atau penyalahgunaan kuasa mengenai kesahan tingkah laku pihak berkuasa yang membuat keputusan seperti dalam kes ini. Pemohon dalam kes ini telah menunjukkan perlakuan yang tidak sah dan menyalahi undang-undang dan ia akan menjadi salah untuk mendesak bahawa ia menghabiskan hak statutori rayuannya, walaupun ia ada. Sebenarnya, kes ini patut sebaik-baiknya dirujuk kepada mahkamah memandangkan ia membangkitkan persoalan undang-undang (lihat perenggan 7–10).

(2) Dalam kes *Penang Realty* ia adalah keputusan Mahkamah Rayuan bahawa pampasan daripada pengambilan alih wajib tidak boleh dicukai. Kes tersebut menggunapakai prinsip tersebut, yang mana ditetapkan dalam kes *Lower Perak*, bahawa pengambilan alih wajib tidak membentuk jualan kerana unsur pengambilan alih paksaan yang menjadikan niat perniagaan tidak sah. Dalam kes ini, tanah tersebut adalah sesuatu yang perlu dan diambilalih secara wajib. Untuk membentuk pendapatan kasar unsur ketiga diperlukan, iaitu bahawa pengambilan alih wajib adalah dalam menjalankan perniagaan. Walau bagaimanapun, dalam kes ini pengambilan alih wajib bukan dalam menjalankan perniagaan. Oleh itu, terdapat unsur paksaan, yang menjadikan niat untuk perniagaan tidak sah (lihat perenggan 17–20, 22–23).

(3) Kes *Penang Realty* dan kes *Lower Perak* adalah autoriti-autoriti yang mengikat responden, sebagai pihak eksekutif. Oleh itu, keputusan responden, yang mana tidak didasarkan atas autoriti-autoriti undang-undang mahkamah yang lebih tinggi, adalah lebihan kuasanya. Berdasarkan doktrin stare decisis, mahkamah ini juga terikat oleh keputusan-keputusan mahkamah-mahkamah yang lebih tinggi (lihat perenggan 24).]

Notes

For cases on application for judicial review, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 254–279.

For cases on assessment, see 10 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2384–2414.

For cases on the jurisdiction of the High Court, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4935–5007.

Cases referred to

Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 KB 64 (refd)
F Housing v Director General of Inland Revenue [1976] 2 MLJ 183 (refd)

Government of Malaysia v Jagdis Singh [1987] 2 MLJ 185; [1987] 1 CLJ 110 (Rep), SC (refd)

Ho Kok Cheong Sdn Bhd & Anor v Lim Kay Tiong & Ors [1979] 2 MLJ 224, FC (refd)

Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd and another appeal [2006] 3 MLJ 597; [2006] 2 CLJ 835, CA (folld)

Kim Thye Co v Ketua Pengarah Jabatan Hasil Dalam Negeri, Kuala Lumpur [1991] 3 CLJ 20 (Rep), HC (refd)

London & Thames Haven Oil Wharves Ltd v Attwool [1967] 2 All ER 124, CA (refd)

Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713; [1994] 3 CLJ 541, SC (folld)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1; [1999] 3 CLJ 65, FC (folld)

Multi-Purpose Holdings Bhd v Ketua Pengarah Hasil Dalam Negeri [2006] 2 MLJ 498; [2006] 1 CLJ 1121, CA (refd)

Penang Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [1997] 1 LNS 453, HC (refd)

Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor [2009] 1 MLJ 555; [2008] 6 CLJ 235, CA (refd)

Legislation referred to

Federal Constitution art 96
Income Tax Act 1967 ss 4(a), 24, 24(1)(a), 91, 99, 134
Land Acquisition Act 1960 ss 8, 16
Rules of the High Court 1980 O 53

DP Naban (Saravana Kumar with him) (Lee Hishamuddin Allen & Gledhill) for the applicant.

Ahmad Ishak bin Hassan (Legal Officer, Inland Revenue Department) for the respondent.

Rohana Yusuf J:

[1] This was an application by the applicant made under O 53 of the Rules of the High Court 1980 seeking a declaration as appearing in paras (a) to (d) of encl 1. The prayers sought in the application are as follows:

(a) a declaration that the respondent is bound by and shall give effect to the decisions of the Supreme Court in *Lower Perak Co-operative Housing Society Berhad v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713; [1994] 3 CLJ 541 and the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd and another appeal* [2006] 3 MLJ 597; [2006] 2 CLJ 835, which held that gains arising from the

compensation for compulsory acquisition of land are not subject to income tax as the element of compulsion vitiates the intention to trade;

(b) A declaration that the decision impact statement issued by the respondent has no legal effect and cannot override the courts' decisions in *Lower Perak* and *Penang Realty*;

(c) A declaration that in the event there is a conflict between the decision impact statement and courts' decisions in *Lower Perak* and *Penang Realty*, the Courts' decisions shall prevail over the decision impact statement by virtue of being part of Malaysian laws; and

(d) An order of certiorari to remove into this honourable court for the purpose of it being quashed the decision of respondent to raise notices of additional assessment dated 9 December 2009 for the years of assessment 2004 and 2005 against the applicant as the respondent had acted ultra vires and without any factual or legal basis in raising the said notices;

BACKGROUND FACTS

[2] The applicant is a property developer. In 1994, the applicant purchased two parcels of land in Mukim Ayer Keroh, Melaka. On two different occasions, one on 31 October 2003, and another on 26 October 2004, the State Government of Malacca issued notices of award and offered compensation pursuant s 16 of the Land Acquisition Act 1960 to compulsorily acquire the applicant's land. The applicant received the compensation but did not subject the compensation to income tax.

[3] The respondent issued notice of additional assessment JA Form, for year assessment 2004 and 2005 with penalty. The applicant did not appeal against the assessment to the Special Commissioners of Income Tax in accordance with s 99 of the Income Tax Act 1967 ('the Act'). Instead, the applicant filed for a judicial review and had obtained leave from this court on 6 January 2010.

ALTERNATIVE REMEDY AND JUDICIAL REVIEW

[4] Learned counsel for Inland Revenue Encik Ahmad Ishak bin Hassan contended that this application cannot be entertained by this court because there is an alternative remedy in that an appeal process is available under the Act. Thus, he said there is no basis for the court to exercise its jurisdiction on this matter, relying on the authority of the Supreme Court decision in *Government of Malaysia v Jagdis Singh* [1987] 2 MLJ 185; [1987] 1 CLJ 110 (Rep). This decision was again followed in *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2009] 1 MLJ 555; [2008] 6 CLJ 235. The Court of Appeal in *Ta Wu Realty* rejected the application for certiorari based on the principle established in *Jagdis Singh*. The established principle is

that when there is an appeal procedure available *certiorari* should not normally be issued unless there are exceptional circumstances. He further contended that the assessment made by the Director General of Income Tax is within the jurisdiction empowered under s 91 of the Act and there is no failure on the part of the respondent to perform statutory duty, and no breach of natural justice had occurred.

[5] For the applicant, learned counsel Datuk DP Naban (Encik Saravan Kumar with him) submitted, relying on the same authority of *Jagdis Singh* that this application comes under the exceptions stated in that case. The Supreme Court in that case, had clearly established three exceptions when the court can interfere. First if there is shown a clear lack of jurisdiction, or if there is blatant failure to perform some statutory duty or there is a serious breach of the principle of natural justice.

[6] Learned counsel contended that the JA Form which was issued to the applicant in exh LLY-21 was based on the decision impact statement ('DIS'). He submitted that the DIS is not in consonant with the decision of the Superior Court. The Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd* [2006] 2 CLJ 835 held that compensation received from compulsory acquisition is not trade and hence does not attract tax. The DIS on the other hand does not follow the decision of *Penang Realty* in imposing tax on the applicant. He therefore contended that the JA Form imposing tax on the applicant here has been issued in excess of jurisdiction. On this basis it was contended that the JA Form issued to the appellant is illegal, void and is an unlawful decision without any jurisdiction, and in excess of authority. Such being the case, the respondent cannot be said to be immune from judicial process following *Jagdis Singh*. The availability of appeal procedure according to learned counsel cannot prevent the court from quashing an order by certiorari. Depending on the facts of a particular case, he submitted the failure to exhaust local remedy does not always deny an applicant to a right to judicial review. He supported his argument and contention relying on the decision in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1993] 3 MLJ 1; [1999] 3 CLJ 65.

[7] Before I proceed to determine this issue, in my view this argument should have been canvassed as a ground for refusing leave or as a ground to set aside leave by this court, which was granted on an inter parte basis. Having perused through the cases cited in authority before me, l hold that judicial review is still available to the applicant and my reasons are set out below.

[8] It is clearly established by the Federal Court in the *Majlis Perbandaran Pulau Pinang* that an application for a judicial review is not barred by the

non-exercise of its internal appeal procedure. As stated by Edgar Joseph Jr FCJ in that case, whilst in theory the court often been recited with incantation that alternative remedy must be exhausted, in practice the courts are often much kinder to an applicant with good case. Having analysed the various conflicting decisions of the English cases in that case the Federal Court states that generally, if an applicant can demonstrate illegality or unlawful treatment then it would be wrong to insist on exhaustion of local remedy. The Federal Court acknowledged that in certain cases such as tax cases, appeal procedure is provided under the statute but if the applicant can demonstrate excess or abuse of power or a breach of natural justice, judicial review would still be granted. Indeed in the present case where there exist special circumstances, the respondent is not immune from the process of judicial review. Similar principle was applied by the high court in *Kim Thye Co v Ketua Pengarah Jabatan Hasil Dalam Negeri, Kuala Lumpur* [1991] 3 CLJ 20 (Rep), which was subsequently upheld by the Supreme Court on appeal.

[9] Thus relying on the principle laid down in *Majlis Perbandaran Pulau Pinang* I hold that the availability of an alternative internal remedy in the form of an appeal process will not bar an application for judicial review. This is so especially where the complaint made to the court is one on error of law or abuse of power that goes to the legality of the conduct of the decision-making authority as in this case.

[10] The applicant here had demonstrated illegality and unlawful treatment, thus it would be wrong to insist that it exhausts its statutory right of appeal, even if it is available. In fact a complaint that raises a question of law, as in the present case, would preferably be referred to the court, being a more appropriate forum.

MERITS OF THE APPLICATION

[11] Coming now to the merits of this application. The main issue of contention in the present case is whether or not the compensation for compulsory acquisition of the applicant's land is subject to income tax under the law. The contention of the applicant's counsel is based on the decision of the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd and another appeal* [2006] 3 MLJ 597; [2006] 2 CLJ 835 which held that the compulsory acquisition of land could not constitute a sale. Taking the position that profits derived from the compensation paid to the tax payer on account of compulsory acquisition of the land is not profit that arises from tax payer's business, Datuk DP Naban contended that the Superior Courts in *Penang Realty Sdn Bhd* and *Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713; [1994] 3 CLJ 541 had held that compensation for compulsory acquisition of land are not subject to

A income tax. The principle established in these two cases he contended is based on the premise that the element of compulsion vitiates the intention to trade. The general law and the law on income tax, requires that a sale must be consensual. It must be based on one's own free will. Thus he contended that since gain derived from compensation paid to the applicant here was on
B account of compulsory acquisition, it is not profit arising out of the tax payer's business activity that was conducted by consensus.

[12] For this reason the applicant submitted that the respondent's decision based on the DIS issued by the respondent in exh LLY- 3 in encl 3, had clearly
C acted without any legal authority and without jurisdiction. The DIS is defective and the respondent in making that DIS had acted ultra vires. It also attracts the constitutional issue under art 96 of the Federal Constitution which provides that *'no tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law'.*
D

[13] The DIS according to Datuk DP Naban has no legal effect and cannot override the decisions of the superior courts. Since the DIS was not issued pursuant to any power given by law, it has no force of law relying on the
E decision in *Multi-Purpose Holdings Bhd v Ketua Pengarah Hasil Dalam Negeri* [2006] 2 MLJ 498; [2006] 1 CLJ 1121 and *Ho Kok Cheong Sdn Bhd & Anor v Lim Kay Tiong & Ors* [1979] 2 MLJ 224.

[14] Matters of tax involve, inter alia, balancing the need of the government
F to realise the taxes and the need of the taxpayer to be protected against arbitrary or incorrect assessment. Datuk DP Naban urged this court to bear in mind the possibility of arbitrary or incorrect assessment brought about by fallible officers who have to fulfil the collection of a certain publicly declared targeted amount of taxes and whose assessment may be influenced by the target to be achieved
G rather than the correctness of the assessment.

[15] For the respondent, learned counsel Encik Ahmad Ishak bin Hassan argued that the respondent had in fact abide by the Court of Appeal decision in *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd and another appeal*
H [2006] 3 MLJ 597; [2006] 2 CLJ 835. A refund was made following the Court of Appeal decision. The Respondent issued the DIS under s 134 of the Act and it is done within the power of the Director General of Income Tax.

[16] The reason for the DIS, according to Encik Ahmad Ishak is because, the
I Court of Appeal in *Penang Realty Sdn Bhd* failed to consider s 24(1)(a) which is an important provision to determine gross income from a business. According to Encik Ahmad Ishak the Court of Appeal had overlooked s 24 in that case but instead it placed a total reliance on the decision *Lower Perak* which held that compulsion vitiates intention to trade. The elements of compulsion in both

cases according to him are different. In *Lower Perak*, the compulsion arose when the remaining lots were forced to be sold to the non-member developer. The compulsion did not arise from compulsory acquisition. The present case is similar to *Penang Realty* because there was compulsory acquisition by the government, which is also mentioned with s 24(1)(a) of the Act, specifically. Following *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64, he contended that in administering tax law one has to rely on what is clearly said and not on intention or implication but only on the language used. Since *Penang Realty* makes no mention of s 24 it is no authority on issue of compensation resulting from compulsory acquisition. This is because according to him s 24 makes specific reference to compulsory acquisition in the treatment of gross income.

[17] I have examined the decision of the Court of Appeal in *Penang Realty*. The facts of that case that are relevant to the present case are these. The tax payer was a company carrying on the business of housing development. It purchased two pieces of land which was compulsorily acquired by the government. Compensation was paid and the amount was accordingly assessed and taxed. The tax payer appealed to the Special Commissioners who held that tax payer is liable to be taxed on the compensation. An appeal by way of case stated was taken up to the High Court. It was dismissed. The taxpayer appealed to the Court of Appeal.

[18] I have also carefully scrutinised the Court of Appeal decision particularly on the issue of whether or not compensation from compulsory acquisition is liable to tax. In my view it is the Court of Appeal decision that it is not. The case of *F Housing v Director General of Inland Revenue* [1976] 2 MLJ 183 was quoted in that decision. It must be noted that in *F Housing* the decision of Mohammad Azmi J states that it does not matter that the compulsory acquisition is an isolated transaction. The company in *F Housing* knew fully well that land in question was to be acquired by the government even before they were purchased. As stated by the learned judge in that case, the company's directors of *F Housing* were well aware that a declaration of intended acquisition of the land under s 8 of the Land Acquisition Act 1960 had been published in the *gazette*. They then took steps to develop the land and convinced the collector that the market value of the land had increased at the point of acquisition. Eventually after the award of compensation was made the company was wound up. On the given facts the learned judge held that the compensation in that case should be treated as income and therefore attracted taxable gain or profit within the meaning of s 4(a) of the Act. The learned judge found support in the English case of *London & Thames Haven Oil Wharves Ltd v Attwool* [1967] 2 All ER 124.

[19] The Court of Appeal in *Penang Realty*, had scrutinised the findings of the court below and states that learned High Court judge had dealt with the compensation arising from compulsory acquisition exhaustively and correctly and affirmed the decision of the High Court. The High Court distinguished *F Housing* decision on the facts (see p 846) and decided to follow the Supreme Court in *Lower Perak Co-Operative Housing Society Bhd*. It applied the principle enunciated by Supreme Court in *Lower Perak* that the compulsory acquisition cannot constitute sale because of the element of compulsion, which vitiates the intention of trade. This position was so clearly emphasised by the High Court in *Penang Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [1997] 1 LNS 453 the reported decision of the High Court.

[20] It is common ground that the land in question here were stock-in-trade and that it was compulsorily acquired. To constitute gross income a third element is required that the stock-in-trade must be compulsorily acquired in the course of carrying on a business. Even applying s 24(1)(a) it is clear that it is to be read conjunctively. It is on this question that parties are divergent on their views. Learned counsel for the respondent submitted that s 24 of the Act had not been addressed or deliberated upon by the Court of Appeal in *Penang Realty*. As also stated in the DIS para 3, that the Court of Appeal relied on *Lower Perak* decision whereas the Special Commissioners relied on *F Housing Sdn Bhd v Director General on Inland Revenue* [1976] 2 MLJ 18.

[21] However, upon scrutiny I am of the view that the Court of Appeal in *Penang Realty* endorsed the High Court decision which distinguished the case of *F Housing Sdn Bhd*, on the facts found by the learned High Court judge in that case (see pp 23 & 24). My reading of *Penang Realty* is that the Court of Appeal had upheld the High Court decision which distinguished these facts found by the court in *F Housing*. The main distinguishable fact is that the act of directors of the company in *F Housing* and the knowledge of the acquisition that they possessed had caused the compensation to be treated as gross income and hence taxable because that by themselves had made the acquisition a trade in the course of business. The knowledge of acquisition is not present in the *Penang Realty* which in my view had led to the decision that it is not a trade relying on the principle enunciated by the Supreme Court in *Lower Perak Co-Operative Housing*. The Court of Appeal in fact opined and followed that Supreme Court ruling that compulsion vitiates trade. Though there is also compulsory acquisition in the *Penang Realty* there is nothing in the judgment that suggests that the company was aware of any impending acquisition as in *F Housing*.

[22] Even the treatment of gross income based on debt owing under s 24 requires that the stock-in-trade sold, or which is compulsorily acquired must be one in the course of carrying on a business. However there was no necessity for

the Appeal Court to refer to s 24 in the *Penang Realty* because in my view s 24 has no application in that case and it is not proper therefore for the respondent to ignore the decision of the Court of Appeal on that basis.

[23] Back to the present case, the facts of this case are not in dispute, the applicant's land was compulsorily acquired. The land was stock-in-trade of the applicant. The compulsory acquisition was not in the course of carrying on a business in the sense of *F Housing*. Therefore there would be element of compulsion which vitiated intention to trade.

[24] Thus the failure of the respondent to follow the decision of the Superior Courts in *Penang Realty* as well as *Lower Perak* renders its decision defective. These two cases are binding authorities on the respondent, being an arm of the executive. Also based on doctrine of stare decisis this court is also bound by the decisions of the superior court. Since the respondent's decision is not based on the legal authorities of the Superior Courts such decision is in excess of its authority.

[25] In view of the above I allow the application of the applicant in encl 1 in prayers (a) and (d) with costs of RM6000.

Application allowed with costs.

Reported by Kohila Nesan